Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)	CC Docket No. 96-254

BELLSOUTH REPLY COMMENTS

BellSouth Corporation ("BellSouth") submits these Reply Comments in response to comments filed pursuant to the Commission's *Notice of Proposed Rulemaking*[1] in the above referenced proceeding.

By its *Notice*, the Commission proposed to adopt rules to implement Section 273 of the Communications Act of 1934, as amended.[2] As BellSouth observed in its comments, however, the *Notice* is fraught with proposals that would unduly constrain, or create strong disincentives for, BOCs' participation in manufacturing. BellSouth urged the Commission to exercise restraint, to avoid imposing rules where none are required by the Act, and to follow the "policy of the United States to encourage the provision of new technologies and services to the public."[3] Significantly, BellSouth's views were consistent not only with those of other Bell operating

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1 *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,* CC Docket No. 96-254, *Notice of Proposed Rulemaking,* FCC 96-472 (rel'd Dec. 11, 1996) (*"Notice"*).

2 47 U.S.C. §§ 151 *et seq.*

3 47 U.S.C. § 157(a).

companies ("BOCs"), but also with those of existing manufacturers of telecommunications equipment and CPE, both large and small.

BellSouth urges the Commission to pay particular heed to the comments of Northern Telecom, Inc. ("Nortel"), and Ad Hoc Coalition of Telecommunications Manufacturing Companies ("Coalition"). Holding substantially different positions (in terms of size) within the manufacturing sector, both of these parties resisted the knee-jerk temptation evidenced by certain others in that industry to hypothesize about potential malfeasance by BOCs if permitted to engage in manufacturing absent stringent regulatory requirements and oversight. Instead, Nortel and the Coalition independently recognized that BOC participation in manufacturing and other activities permitted by Section 273 can produce substantial public benefits and should not be discouraged by excessive regulation.

For example, Nortel -- a massive enterprise ("the leading global supplier . . . of digital telecommunications system"[4]) urged the Commission "to be circumspect in adopting new requirements or new regulations,"[5] notwithstanding that, among other relationships, it "expects to compete against the BOCs when they become manufacturers."[6] Consistent with its principal maxim -- "if it isn't broken, don't fix it"[7] -- Nortel specifically attested that existing network

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4 Nortel at 2.

5 Nortel at 17.

6 Nortel at 2 (also indicating that it expects to remain a supplier of telecommunications equipment to the BOCs; to enter collaboration, research, and royalty arrangements with the BOCs; and both to receive from and provide to the BOCs network information).

7 Nortel at 3.

disclosure rules "adequately balance" the tension between premature and unduly delayed disclosure, and need not be modified.[8]

Nortel also was troubled by the Commission's suggestion that information might be required to be disclosed at a level of disaggregation that would jeopardize manufacturers' (or carriers') intellectual property rights or compromise the confidentiality of proprietary information. Acknowledging that there may be some "theoretical risk" that an incumbent LEC could attempt to use proprietary information to preclude or delay entry by competitor, Nortel was convinced that the compelled disclosure of confidential or proprietary information would lead to the "very real adverse effects" of "stifle[d] innovation by telecommunications equipment manufacturers and . . . repress[ed] growth of the telecommunications industry."[9] BellSouth agrees with Nortel that such a policy would be adverse to the public interest.

Representing the opposite end of the spectrum in terms of relative size, the Coalition expressed concern that the Commission's proposals with respect to BOCs' negotiation of royalty agreements or engaging in close collaboration with manufacturers, if adopted, "would be unlawful and would harm telecommunications manufacturers, especially small manufacturers."[10] First, as the Coalition presents, there is no legislative basis for adopting a strict limitation on the form of royalty agreements into which BOCs may enter.[11] Further, royalty agreements based on the number of units sold or on another comparable measure of marketplace success have been found

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8 Nortel at 4.

9 Nortel at 7.

10 Coalition at 1.

11 Coalition at 2-3.

to be publicly beneficial by stimulating competition in telecommunications manufacturing,[12] and will particularly benefit smaller manufacturers by providing them access to capital at lower risk.[13]

Similarly, the Coalition opposes any attempt to construe narrowly the scope of "close collaboration" that is permitted under Section n273(b)(1) between a manufacturer and a BOC.[14] As the Coalition showed, there is strong evidence in the history of the Act that Congress "intended to provide broad collaborative authority on the ground that the benefit of doing so outweighs any competitive advantage that a manufacturer might obtain from such collaboration."[15] The Coalition also cited "research studies [that] show that marketplace success often *requires* such collaboration in high technology industries like telecommunications."[16] BellSouth agrees with the Coalition's assessment that Section 273(b) is to be interpreted broadly.

In contrast with these comments that exemplify reasoned consideration of the benefits that BOCs can bring to the manufacturing sector through various degrees of involvement in that activity, a few commenters chose merely to parrot the Commission's own speculative rationale for its restrictive proposals and to re-offer the Commission's suggestions as "evidence" of a need for comprehensive and burdensome regulations. Such arguments, however, are based on mis-readings of the Act itself and suffer from a lack of any credible support. Moreover, because the

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[12] Coalition at 3, *citing, United States v. Western Electric*, 12 F.3d 225, 243 (D.C. Cir. 1993).

[13] Coalition at 3-5.

[14] Coalition at 6-8.

[15] Coalition at 7.

[16] Coalition at 3-4 (emphasis in original) (citation omitted).

proposed regulatory constraints would be contrary to the public interest, these arguments should be rejected.

The Telecommunications Industry Association ("TIA"), for example, totally misconstrues the definition of manufacturing to include those activities permitted by Section 273(b).[17] As BellSouth demonstrated in its comments, the activities set forth in Section 273(b) are not "manufacturing" and therefore are not subject to the limitations on manufacturing imposed under Section 273(a).[18] Thus, a BOC can presently perform those activities without meeting the separate subsidiary or other requirements of Sections 272. The Act itself makes this clear by stating in both 273(b)(1) and (b)(2) that "[s]ubsection (a) shall not prohibit a Bell operating company from" engaging in the described activities.[19]

TIA also improperly suggests that the Commission adopt an extremely narrow scope for the activities permitted by Section 273(b). If the Commission were to adopt TIA's position, however, the close collaboration and research and development permitted by Section 273(b) would be no broader than the activities allowed before the passage of the Act. If such a narrow interpretation were intended by Congress, there would have been no reason to include Section 273(b). The activities permitted by TIA's narrow construction were already permitted under the MFJ's manufacturing restriction and thus continue to be permitted by virtue of Sections 271(f) and 273(h). Section 273(b) must be given meaning and thus must be read to authorize activity

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17 TIA at 13-14.

18 BellSouth at 2-4. Even the Information Technology Industry Council ("ITIC") which generally supports strict application of additional regulations, acknowledges that BOCs can engage in activities permitted by Section 273(b) before obtaining Section 271 authority. ITIC at 4.

19 *See* 47 CFR § 273(b)(1), (b)(2).

beyond that grandfathered under Section 271(f). Moreover, as pointed out by the Coalition and discussed above, such a narrow interpretation would constrain BOCs' participation in these procompetitive and innovative activities and thus would harm manufacturers, particularly small manufacturers.[20] Therefore, it is improper for the Commission to adopt restrictive definitions for any of the activities permitted by Section 273(b).

TIA's erroneous readings of the scope of manufacturing and of activities that are not manufacturing is complemented by its equally erroneous reading of the application of Section 273(c) to BOCs that are not engaged in manufacturing. Thus, TIA wrongly asserts that Section 273(c) network disclosure obligations attach to all BOCs, regardless of whether they are engaged in manufacturing. In particular, TIA claims that BOCs incur new disclosure obligations when engaged in close collaboration with manufacturers or other Section 273(b) activities. Because close collaboration is not manufacturing, however, and because Section 273(c) only applies to BOCs engaged in manufacturing,[21] Section 273(c) does not apply to BOCs engaged in Section 273(b) activities.

Even in those cases in which Section 273(c) information disclosure requirements would apply, TIA has made no showing of why the disclosure principles that have been in effect for more than a decade are in sudden need of revision.[22] Indeed, for at least as long as the existing disclosure rules -- particularly the "make/buy" disclosure trigger -- have been "criticized as

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[20] Coalition, *passim.*

[21] BellSouth at 8-11; SBC at 8; Ameritech at 8-9.

[22] Indeed, TIA's own recitation shows that during this period "enormous benefits to American consumer" have emerged from the manufacturing sector, including "lower prices, improved quality, and an ever-expanding array of innovative new products." TIA at 2.

inadequate,"[23] they have been repeatedly *held* to properly balance the interests of network providers and manufacturers -- including when applied to the vertically integrated operations of AT&T.[24] Further, the most recent determination of the propriety of the make/buy point occurred less than eight months ago.[25] Nothing has occurred in the intervening months that would suddenly make that determination irrelevant. Nor is BellSouth aware of any complaints that carriers (or specifically BOCs) have not been providing adequate or timely disclosure of information.[26] The case simply has not been made for modifying a long-standing and recently reaffirmed disclosure standard.

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[23] TIA at 21 (citing comments filed by another party in another proceeding). Of course, for every criticism that the make/buy point is too late, an equal argument can be made that the disclosure rule itself is anticompetitive, stifles the incentive to innovate, and introduces arbitrary delays into the offering of innovative services.

[24] *See, e.g., Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof; Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations*, 104 F.C.C. 2d 958, 1082-83 (1986); *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, 2 FCC Rcd 143, 151 (1987); *Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company*, 102 F.C.C. 2d 655, 684-88 (1986).

[25] 47 CFR § 51.331, *adopted in, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, FCC 96-333, ¶ 166-260 (rel. Aug. 8, 1996).

[26] This absence of any known complaints suggests it is hardly worth the Commission's energy or resources to attempt to craft special complaint or other enforcement mechanisms for its disclosure rules. ITIC at 11-13; TIA Appendix A, at 7-8.

CONCLUSION

For the reasons set forth above and in its Comments, BellSouth urges the Commission not to impose rules where none are called for by the Act, nor to impose rules that stifle BOCs' incentives to engage in product and service innovation, development, or manufacture that Congress has determined is in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE
(CC DKT. 96-254)

I hereby certify that I have this 26th day of March, 1997 served the following parties to this action with a copy of the foregoing BELLSOUTH REPLY COMMENTS by placing a true and correct copy of the same in the United States mail, postage prepaid, addressed to the parties on the attached service list.

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